JD–25–97
Hato Rey, PR

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

TREBOL MOTORS CORPORATION

and Case 24-CA-7359

UNION INSULAR DE TRABAJADORES INDUSTRIALES
Y CONSTRUCCIONES ELECTRICAS

Harold E. Hopkins, Esq., of Hato Rey, Puerto Rico,
for the General Counsel.

Tristan Reyes-Gilestra, Esq., of Hato Rey, Puerto
Rico, for the Respondent.

DECISION

Statement of the Case

JAMES L. ROSE, Administrative Law Judge: This matter was tried before me at Hato Rey, Puerto Rico, on October 28, 29 and 30, 1996, upon the General Counsel's complaint which alleged that the Respondent discharged certain of its employees in violation of Section 8(a)(3) of the National Labor Relations Act, as amended, 29 U.S.C. §151, *et seq.*

The Respondent generally denied that it committed any violations of the Act and affirmatively contends that each of the discharges was because the individual in question had failed for the fourth month to meet the sales quota. The sales quota had been established and each individual had failed to meet it three times before there was any union activity.

Upon the record[1] as a whole, including my observation of the witnesses, briefs and arguments of counsel, I hereby make the following findings of fact, conclusions of law and recommended order:

I. JURISDICTION

[1] The transcript contains many holes where the recording equipment malfunctioned. The parties have stipulated that the transcript be received without the missing portions, waived submission of additional evidence and/or reexamination of those witnesses whose testimony is incomplete and that the case be decided on the transcript, exhibits, observation of witnesses and post-hearing briefs. In addition, Counsel for the General Counsel moved for certain corrections in the transcript, which motion is granted. The stipulation and motion are attached to the record as ALJ Exhibits 1 and 2.

The Respondent is a Puerto Rico corporation, with offices and places of business in San Juan and Ponce, Puerto Rico, and is engaged in the retail sale of automobiles, parts and accessories. In the course and conduct of this business, the Respondent annually purchases and receives goods valued in excess of $50,000 directly from points outside the Commonwealth of Puerto Rico. I therefore conclude that the Respondent is an employer engaged in interstate commerce within the meaning of Sections 2(2), 2(6) and 2(7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Charging Party, Union Insular de Trabajadores Industriales y Construcciones Electricas (herein the Union) is admitted to be, and I find is, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts.

The Respondent is engaged in the retail sale of Volvo and Subaru automobiles, in connection with which it employs salesmen and women. Until early 1995[2] the salespersons had been compensated on a straight commission basis; however, apparently as a result of some kind of a wage and hour action, they were put on a minimum wage ($4.25 per hour) plus commission basis. And, unlike previously, they were required to punch a time clock.

Thus on April 28 the 1995 quota system, and the commissions, were announced. Though the employees had been expected to meet quotas in the past, the system for 1995 was somewhat different, but in what respect is not clear and really is not material. In essence, each salesperson was required to sell a total of seven units each month, and:

> In order to assure ourselves that everybody will actively participate and try to achieve these important goals, a system of disciplinary warnings and measures has been established. The first time that anyone fails the goals a written warning will be given. The second time he/she fails to attain the goal, a more severe warning will be given. The third time that he/she fails to attain the goal, a one week suspension without pay will be given. The fourth time he/she fails will have to meet with me (Ricardo Gonzalez) and Mr. Jaime Vazquez to determine his/her future in the company, which may result in permanent separation from employment and salary. (sic.)
>
> This system substitutes any previous system of goals and incentive from May 1 on and will be revised for the calendar year 1996.

In May Ramon Borges sold four units, and as a result, on June 10 he received a memo titled “First Warning.” In June he sold three units and on July 6 received a “Second Warning” which included: “Should you fail for a third time, you will have to meet with Mr. Vazquez, Mr.

[2] All dates are in 1995, unless otherwise indicated.

Canelas and myself to discuss the changes that have to be done with the purpose of preventing you from not complying a fourth time. Avoid this meeting, comply with your goal."

While Borges sold only two units in July, he was on vacation part of the month and therefore was not held to the quota; however, in August he again sold only four units. He did not receive a third written warning, nor did he receive a warning for selling zero and six units, respectively, in September and October. These were months of very heavy storms in Puerto Rico and the Respondent did not hold any salespersons to the established quota.

In November Borges sold eight units, but in December sold five. Thus on January 2, 1996, he received a discharge letter for "noncompliance with the goad during the month of December" reflecting that he had received a third warning in October. A week prior to his discharge, Borges was offered a job in management, which he declined.

The Union's organizational campaign began in November, with most of the participating salespersons signing authorization cards on November 27. Borges, however, did not sign a card or participate until after his discharge.

The other five alleged unlawful discharges followed the Borges pattern. Thus, Elisa Gattorno sold three, four and three units, respectively, in May, June and July, for which she received first and second warnings in June and July. Then in August she met the quota and received a congratulatory letter, to which she responded disclaiming that the warnings influenced her August production. September and October were again off months, but ignored by the Respondent due to the weather. In November she sold three units and was discharged by letter of December 8. The discharge letter reflects a third warning in July, however this was a second (and reflected her having sold five units in June whereas company records show four). The congratulatory letter to Gattomo of September 7 notes a third warning, presumably for July's production of three.

Eduardo Avendano sold four units in each of the months May, June and July, for which he received a first warning on June 10 and a second on July 6. His low production in August was due to being on vacation and in September and October due to the hurricanes. In November he met the quota, but in December fell back to three units and was discharged by letter of January 2, 1996.

Miguel Ocasio sold eight units in May, five in June, zero in July, four in August, eight in November and six in December. He received a first warning on July 6 and a second on August 10. He testified that he had a meeting with managers in October at which he was given a third warning. He was discharged by letter of January 2, 1996.

Migdalia Sanchez sold four, three and two units in May, June and July, seven in August and three in November. Sanchez received a first warning on June 10 and a second on July 6 and met with Ricardo Gonzalez in August. Sanchez was discharged on December 8.

Finally, Iris Platal sold four, three and three in May June, and July; seven in August and four in November, receiving first and second warnings and a discharge letter of December 8.

Sanchez testified that between November 27, when the cards were signed, and December 6, group supervisor Richard Canelas said "the union was no good" and "I know who is heading this, and it is Ms. Elisa (Gattorno)." Sanchez also testified to a meeting with the sales force on December 6 when Conchita Gonzalez (the Respondent's president) said "that

(the Union) was not what she wanted. And in a very sarcastic tone she indicated that she could work with the union."

Ocasio similarly testified that at the December 6 meeting Gonzalez said, "if the salesmen wanted a union, the company would work with a union." Avendano testified that Gonzalez also said that the union had tried before and "that the one that tried -- had tried to get the union in there were no longer there." Ocasio denied that Gonzalez made such a statement.

Borges also testified that at the meeting Mrs. Gonzalez "indicated to us that she would prefer not to work with a union, but, if she had to have one, she would work with it." "Work with it. But she preferred not to work with it and she gave the orders in her company and even the union delegate who did not meet his sales quota, would be fired."

Gattono testified that by November the salespersons felt pressured by the quotas and sought a union and that she and Ocasio got authorization cards from the Union. On the Saturday before she was discharged, she testified, supervisor Richard Canelas said "what I was doing was very dangerous," and "this can have consequences." She asked "what he was referring to and he did not want to say."

According to Gattono, her friend Lourdes Carrera Ferrer[3] was the fleet sales manager. Gattono testified that on December 6, Carrera came to her home and said she had just been to a meeting of managers with the Respondent's attorney. Carrera said that Gattono would be

[3] Counsel for the General Counsel attached to his brief a "Sworn Statement" of Carrera dated December 14, 1995, to be included in the record. Counsel for the Respondent objected on grounds that it was available and could have been offered during the hearing, therefore the General Counsel's offer with his "Brief is not only inappropriate, but also constitutes a gross violation of Respondent's right to due process." At the outset of the hearing Counsel for the General Counsel moved to amend the complaint to allege that Carrea was a supervisor and agent of the Respondent, which I granted over the Respondent's objection as to timeliness. The undenied testimony is that she attended management meetings as the fleet sales manager and in a position statement submitted by Counsel for the Respondent in connection with a charge filed by Carrea, he stated, "Carrera was a fleet supervisor of the Company and, therefore, not covered by the National Labor Relations Act." I consider this an admission of the Respondent as to status of Carrea. *Waren L. Rose Castings, Inc. d/b/a V. & W. Castings,* 231 NLRB 912, 913 n.2 (1977). The evidence preponderates in favor of concluding that when employed, Carrea was a supervisor and therefore an agent whose statements amount to an admissions of the Respondent. And I so treat the statements she made to Gattono. However, the affidavit was given the day before her employment terminated under unknown circumstances. Hearsay admissions are received because experience suggests that one does not make admissions against her (or her employer's) interest unless they are probably true. This inference does not rationally survive one's termination of employment. Here Carrera's affidavit and cessation of employment are so close in time as raise doubts about the reliability of the assertions. Thus, while Carrera's assertions concerning the Respondent's motive could be true, they are not so likely as to justify foreclosing cross examination. To receive that affidavit now would do so. Such would also deny the Respondent the opportunity of rebutting the assertions therein and would deny the Respondent a fair hearing. Since the affidavit was in the possession of the General Counsel at the time of the hearing, and was in fact referred to during testimony, I conclude there is insufficient basis to now receive it into evidence. I therefore decline accept or consider the affidavit.

fired, "since I had been singled out as union leader," along with Ocasio. Carrera further told her that "Ms. Gonzalez indicated to her that she was going to utilize the quotas, to use the quotas or any other company procedure, to fire those of us that were involved with the union."

An election was subsequently held and the Union was certified as the representative of a unit of salespersons.

B. Analysis and Concluding Findings.

1. Alleged 8(a)(1) Activity.

At the outset of the hearing, Counsel for the General Counsel moved to amend the complaint to allege that supervisor Richard Canelas threatened employees with unspecified reprisals should they engage in union activity and created the impression that their union or other concerted activities were under surveillance by the Respondent. Over objection, the motion was granted.

The substance of these allegations was testified to by Avendano and Gattorno. Avendano testified that in November, at the Santurce lot, he had a conversation with Canelas about the difficulty they were having meeting the quotas. Avendano told Canelas that "the boys had been talking about a union -- about unionizing." And Avendano asked if Canelas could help resolve the problems they were having.

Gattorno testified that Canelas "was constantly looking at who I was talking to and what group I was with" and the Saturday before she was fired "he signaled to me with his right hand and said what I was doing was very dangerous. . . this can have consequences."

I do not believe that this testimony is sufficiently definite to establish the allegations alleged. What Canelas is suppose to have said and done is simply too vague to conclude that he threatened employees or gave the impression that their protected activity was under surveillance.

The other allegation of 8(a)(1) conduct concerns the December 6 meeting of employees with management during which Mrs. Gonzalez stated that she did not want a union. However, the preponderance of testimony from witnesses for the General Counsel was to the effect that if a union was voted in, she would work with it. Such, I conclude, does not inform employees that it would be futile to organize.

Although the Respondent certainly knew that the salespeople were organizing, and had in fact received a representation petition by about December 6, I conclude that it did not violate Section 8(a)(1) as alleged.

2. The Discharges.

The only evidence of union animus is the testimony of Gattorno relating to Carrera. While admissible, it is minimal. Nevertheless, given the Respondent's knowledge of the employees' union activity, followed closely by the discharges of nearly one-half of its sales force, and the statement of Carrera to Gattorno that at a management meeting it was said

Gattorno would be discharged since she had been singled out as a union leader, I conclude that the General Counsel made out a prima facie case of discrimination. Thus the burden shifted to the Respondent to prove that the six individuals would have been discharged notwithstanding the union activity. *Wright Line, a Division of Wright Line, Inc.,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st. Cir. 1981). I conclude that the Respondent met its burden.

The issue is whether, absent the union activity, the Respondent would have discharged the individuals as and when it did. I conclude it would have. To conclude it would not, given the facts here, would be pure speculation.

Several months before the employees approached the Union, the Respondent instituted a new quota system, which included a statement that "(t)he fourth time he/she fails will have to meet with me and Mr. Jaime Vazquez to determine his/her future in the company, which may result in permanent separation from employment and salary." Three of the six missed their quotas four times prior to the advent of any union activity; the other three missed theirs three times, the fourth, in each case, being in December.

The employees testified that there were reasons for not making the quota, such as too many salespersons, too little advertising and too low of inventory. The fact remains, however, that the Respondent had a quota system which could not have been motivated by union activity, and the employees who were discharged did not make their quotas. They were each given a first and second written warning (again before any union activity) and such testimony as there is indicates they received oral third warnings. The Respondent did not follow the outlined discipline procedure with precision with regard to the third warnings with a one week suspension. But in general, the procedure was followed. Any flaws were uniform and occurred before the union activity began.

Mrs. Gonzalez admitted that she told employees at the December 6 meeting that she had received a request from the Union and that she did not wish a union to come in, "but that they had every right to have a union if that is what they wanted. . . And that we would work with the union without problems." However, she told them that the quotas would not be eliminated. It is not an unfair labor practice for her to have taken this position or to have said so.

Important to my conclusion that the Respondent would have separated even very senior salespersons, as it did, had there been no union activity is the discharge of Borges. He had worked for the Respondent 12 years, and had some expertise such that notwithstanding his poor sales record in 1995, the Respondent offered him a managerial position in late December. He declined, and since he missed his quota for the fourth time in December, he was discharged in January. At the time he had not signed an authorization card, or otherwise participated in any union activity.

If, as the General Counsel contends, the Respondent knew who was active in the union campaign, then it must have also known that Borges was not. Yet he was discharged. On the other hand, the remaining salespersons met their quotas, and were not discharged yet many, if not all, were involved in the union campaign. By a vote of seven to two, a majority of the remaining employees voted in favor of the Union on January 17, 1996.

Though under a somewhat different system, the Respondent offered evidence of discharges of four employees in early 1995 for failing to meet the quotas then in effect.

With this history of discharging salespersons who do not meet the established quotas, and the fact that each of the six dischargees here in fact did not achieve their quotas for four months (not including the hurricane months), I conclude that the Respondent would have discharged them in the absence of any union activity. Accordingly, I conclude that the Respondent did not violate Section 8(a)(3) as alleged.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended [4]

ORDER

The compaint is dismissed in its entirety.

Dated, Washington, D.C.
February 13, 1997

James L. Rose
Administrative Law Judge

[4]If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.